

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

CARTER HAYES, LLC,
a Virginia limited liability company
4115 Annandale Road
Suite 205
Annandale, Virginia 22003

Plaintiff.

v.

CA No. _____

FEDERAL TRADE COMMISSION,

Defendant.

Serve at:
400 7th Street, SW
Washington, D.C. 20024

Also Serve:
Attorney General of the United States
Main Justice Building
10th & Constitution Avenue, N.W.
Washington, DC 20530
and
United States Attorney for the Eastern
District of Virginia
2100 Jamieson Avenue
Alexandria, VA 22314

**COMPLAINT FOR INJUNCTIVE RELIEF,
DECLARATORY JUDGMENT AND BREACH OF CONTRACT**

1. This is a two count cause of action: (a) Count I seeks both injunctive relief and a declaratory judgment under the Freedom of Information Act, 5 U.S.C. § 552, ("FOIA") directing the release of improperly withheld agency records by Defendant Federal Trade Commission ("FTC") in

connection with FOIA Request 2017-00444, and (b) Count II seeks damages for the FTC's breach of contract and the Commission's failure to account for escrowed search fees in connection with FOIA Request 2017-00444.

JURISDICTION AND VENUE

2. This Court has both subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552 (a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331. Venue lies in this district under 5 U.S.C. § 552 (a)(4)(B).

FOIA DATED JANUARY 25, 2017 – FTC FOIA 2017-00444

3. Plaintiff, Carter Hayes, LLC ("CH") is a Virginia law firm. On January 25, 2017, CH filed the attached Freedom of Information Act, 5 U.S.C. §552, *et seq.* ("FOIA") request on behalf of a not-for-profit organization (the "2017 FOIA Request"). ***Exhibit A.***

4. For over ten years, CH has been filing similar FOIA requests with the Defendant FTC seeking the same type of records.

5. The FTC is an independent administrative agency of the government of the United States within the meaning of 5 U.S.C. § 552 (e).

6. The Defendant agency acknowledged receipt of the 2017 FOIA Request by letter dated February 1, 2017. ***Exhibit B.***

7. In the February 1, 2017 letter, the FTC advised CH that it would be unable to respond to CH within twenty- business days, as required by statute, because: (i) certain requested records were located off campus in field offices, and (ii) the requested documents were voluminous in nature. ***Id.***

8. By response letter dated February 8, 2017, CH voluntarily extended the twenty-business

day deadline and agreed to narrow the scope of the request. *Exhibit C.*

9. On March 9, 2017, the FTC wrote advising that: (i) the agency had identified 15 Offices or Divisions within the FTC with possible responsive records; (ii) the search for the requested documents would cost in excess of \$2,500.00; and (iii) the FTC was enclosing twenty-one pages of partially redacted, responsive documents. *Exhibit D.*

10. In the March 9, 2017 letter, the FTC also demanded advance payment, per 16 C.F.R § 4.8(h), of estimated search fees. The Defendant did not provide any detail or explanation as to how the FOIA Office arrived at this fee estimate. As of March 9, the FTC's letter indicated that the agency had found only 21 responsive records. This was despite the Commission's earlier February 1st letter advising of the need to unilaterally extend the statutory FOIA deadline because the request required the FTC to "collect, and examine a voluminous amount of separate and distinct records..." *Exhibit B.*

11. In light of the FTC's unwillingness to comply with previous FOIA requests, the Plaintiff also sought the assistance of the FTC's FOIA Public Liaison Officer (the FTC's statutorily designated FOIA assistance officer) to mediate the matter. *See Exhibits C and E.*

12. The FTC FOIA Public Liaison Officer did not provide any response to the CH communications.

13. By check dated March 20, 2017, CH paid \$2,500.00 in advance to cover what the FTC characterized in its March 9th letter as search fees. The CH cover letter which accompanied the payment check indicated the \$2,500.00 was for advance payment of any FOIA charges. *Exhibit E.*

14. The FTC has claimed that on or about April 3, 2017 the agency sent a letter to CH with an invoice relating to the \$2,500.00 in escrowed fees.

15. CH did not receive the alleged letter and/or an invoice either electronically or by US mail.

16. CH also filed a series of ancillary FOIA requests to the FTC based upon the processing of FOIA 2017-00444 in an attempt to (i) ascertain why the FTC could not gather the FOIA 2017-00444 documents in a timely fashion; (ii) quantify the reasonableness of fees charged CH by the FTC to process FOIA 2017 – 00444; and (iii) improve and streamline future CH FOIA information requests similar to FOIA 2017-00444.

17. Ancillary FOIA 2017-00669 sought copies of those documents generated by the FTC FOIA Office in searching for documents responsive to FOIA 2017-00444. **Exhibit F.** This request sought documents generated by the FTC FOIA Office during the 100 days period that it took the Defendant to complete the response to FOIA 2017-00444.

18. Release of these ancillary documents by the FTC would show, based upon FTC interoffice email communication exchanges, the true complexity of CH's FOIA 2017-00444 search request, and why it took the FTC FOIA Office 100 days to process FOIA 2017-0044.

19. Most importantly, the release of these records could be used by CH to narrow the scope of any future FOIA requests by disclosing the FTC's preferred "search words" or "keywords" for CH's requests. The FTC denied the release of all responsive records to this FOIA 2017-00669 request. **Exhibit G.**

20. Ancillary FOIA 2017-00670 sought information concerning how many requests for records, processed by the FTC during calendar year 2016 through March 20, 2017, resulted in fees of more than \$2,250.00. **Exhibit H.**

21. The FTC responded that "[o]ur search of the FTC's records did not identify any record that would respond to your request." **Exhibit I.** Fourteen days later on April 3, 2017, the FTC alleges it sent an invoice to CH in the amount of \$2,500.00. This would have made CH's request the most

expensive FOIA search at that time.

22. Ancillary FOIA 2017- 00753 requested copies of the ten largest invoices issued by the FTC during calendar year 2016 through April 10, 2017. **Exhibit J.** The FTC responded by letter and provided copies of ten cover letters and ten invoices. **Exhibit K.** Each of the cover letters referenced the enclosure/attachment of an invoice.

23. The largest of the FOIA related invoices released to CH pursuant to this ancillary request was for \$2,223.76.

24. The response to FOIA 2017- 00753 did not include the invoice which was allegedly sent to CH on April 3, 2017. If sent to CH on April 3, 2017, the April 3rd invoice should have been included as part of this ancillary FOIA delivery.

25. By letter dated April 7, 2017, which bore two reference numbers - FOIA 2017-00669 and FOIA 2017-00444 -, the FTC: (i) advised that it had located approximately 584 pages of records responsive to FOIA 2017-00669; (ii) denied CH access to all 584 pages of responsive records; and (iii) issued CH Invoice No. 004145 in the amount of \$140.00 for charges associated with “Review/Excising” and “Coordination/Approval/Denial” of FOIA 2017-00669. **Exhibit G.**

26. By denying, in full, all the records responsive to FOIA 2017-00669, the FTC denied, in full, any access to, or ability for CH to review, the process by which the Commission attempted to comply with FOIA Request 2017-00444 thus necessitating this Complaint. **Id.** The Defendant would not provide a single record which reflected the FTC’s attempt to satisfy the FOIA statute or the Plaintiff’s request in FOIA Request 2017-00444.

27. CH FOIA Request 2017-00444, which identified a mere 368 responsive records, was one of the most expensive FOIA requests charged by the FTC to process any request during calendar year 2016 through March 20, 2017.

28. On May 5, 2017, the FTC sent a final response letter in FOIA Request 2017-00444 which identified an additional 368 responsive records with a partial release of 39 pages of documents.

Exhibit L. The May 5th letter also contained an invoice for an additional \$500.00 and no explanation as to what happened to the \$2,500.00 previously escrowed by the FTC as an advance payment from CH.

29. Therefore and after 101 days and at a cost of \$3,000.00, the Defendant found only 389 pages of responsive FOIA 2017-00444 records of which the FTC produced only 60 pages of partially redacted records to CH.

30. On August 3, 2017, CH filed an administrative appeal with the FTC. **Exhibit M.**¹

31. In its administrative appeal, CH requested: (i) return of CH's \$2,500.00 payment as the charge for search services was not documented by the FTC, and (ii) an appeal of the denial to release the responsive records.

32. On August 24, 2017, CH was contacted by Jamie Taronji, Jr., Esq. of the Office of the General Counsel of the FTC seeking an extension of the date by which the agency was required to respond to the appeal.

33. In seeking to resolve the outstanding issues with the FTC, CH again voluntarily agreed to extend the period the Commission had to respond to FOIA 2017-00444. This time with respect to the appeal. **Exhibit N.**

34. By letter date September 19, 2017, the FTC denied CH's administrative appeal in a *pro forma* manner. The denial stated that: (i) the FTC's records indicate that invoice 00000004142, dated April 3, 2017, in the amount of \$2,500.00 was sent to CH; (ii) fees assessed CH were not excessive

¹ **Exhibit M** is the CH administrative appeal letter and does not include the exhibits to the CH administrative appeal. The communications between the Plaintiff and Defendant have been attached to this Complaint in chronological order as exhibits.

and (iii) the FTC would not provide any additional responsive records. ***Exhibit O.***

35. The September 19, 2017 administrative appeal letter did not include a copy of the disputed April 3rd invoice or any other records in support of Defendant's claims that the invoice was sent to CH.

36. By letter dated February 2, 2018 and addressed to the Acting General Counsel of the FTC, CH contacted the FTC for a final time seeking to avoid litigation with respect to FOIA 2017-00444. CH advised that litigation may be avoided if the FTC would: (i) provide CH with a copy of the invoice allegedly sent to CH on April 3rd or refund CH the \$2,500.00 of undocumented fees collected by the FTC; (ii) provide CH with a Vaughn Index of withheld FOIA 2017-00444 records; and (iii) identify the keywords use by the FTC in seeking responsive FOIA 2017-00444 records.

Exhibit P.

37. On February 8, 2018, the FTC declined CH's proposal to avoid litigation. The Commission declined to provide a Vaughn Index or any other information regarding the withheld documents.

Exhibit Q.

38. The FTC also sent a copy of an invoice for \$2,500.00 printed on August 25, 2017 and purportedly created on April 3, 2017. This was the first time CH received a copy of this invoice.

39. The August 25th print date on the alleged invoice is one day after Jamie Taronji, Jr., Esq. of FTC's General Counsel's Office contacted CH requesting an extension of the time period for the Commission's response to the CH administrative appeal.

40. While requesting the extension, Mr. Taronji failed to disclose the existence of any invoice nor did he question why CH would raise the issue of the missing \$2,500.00 in escrow fees as part of its appeal if such an invoice, in fact, did exist.

41. Twenty-three days later, on September 19, 2017, the FTC denied the CH administrative

appeal but did not include a copy of the alleged invoice or any records which reflected the invoice was sent to CH or what had happened to the escrowed funds.

42. The new FTC letter of February 8, 2018 states: “As a threshold matter, I did not read your appeal letter as requesting another copy of the invoice, which our records show was included in the initial response.” *Ex. Q.*

43. The CH administrative appeal clearly states: “Thereafter, CH has not received an invoice or other information from the FTC accounting for the \$2,500.00.” *Ex. M.*

44. Plaintiff could not request a copy of a specific invoice, in its administrative appeal, when that invoice was not printed until after the CH administrative appeal was filed.

45. Further, the FTC does admit the CH administrative appeal requested the return of the \$2,500.00 escrowed funds. *Ex. Q.*

46. Not only has the FTC failed to timely comply with FOIA Request 2017-00444, the agency has refused to properly account for escrowed funds tendered by the Plaintiff to the Defendant. Even if the invoice is authentic, the alleged invoice fails to inform the Plaintiff of the nature of the costs for the records search. *Id.* Is the FTC charging CH, for a one hour FOIA search at \$2,500.00 per hour? Is the FTC charging CH for a ten hour FOIA search at \$250.00 an hour? Is the FTC charging CH for a twenty-five-hour FOIA search at \$100.00 an hour? Or is the FTC alleging that it claims to have searched for 100 hours to locate approximately 368 records and is charging CH at a rate of \$25.00 per hour? *Id.* The alleged invoice is useless in this form.

47. The Defendant failed to disclose any materials or make any determinations regarding the request within the time period provided by FOIA. 5 U.S.C. 522 (a)(6)(A)(ii).

48. Even though Plaintiff made multiple requests for assistance from the FTC’s FOIA Public Liaison Officer, the Liaison Officer failed to address the Plaintiff’s concerns regarding the delays

and incomplete nature of the Defendant's FOIA responses.

49. To the extent invoices have been provided to CH, the FTC has presented invoices for services that are devoid of basic information including: (i) when the services were allegedly provided; (ii) who provided the services; (iii) the start date and stop date time periods covered by an invoice and (iv) any outstanding balance(s) or credit(s) for prior payment, such as the \$2,500.00 CH escrow. The FTC invoices lack rudimentary accounting and commercial information associated with routine billing invoices.

50. The invoices are little more than single line "Block Billing" forms for alleged attorney or professional services or search fees. The invoices cannot be audited because they contain no substance as to how the escrow funds have been expended for what services or when the services were allegedly provided.

51. The Plaintiff has exhausted its administrative remedies.

52. As a result of the Defendant's complete failure to comply with the letter or the spirit of the FOIA requirements, the Plaintiff has filed this Complaint.

FIRST CAUSE OF ACTION: VIOLATION OF FOIA

53. Plaintiff re-alleges the allegations contained in ¶¶ 1- 52.

54. Defendant has wrongfully withheld the requested documents from the Plaintiff.

55. Defendant failed to respond to FOIA 2017-00444 within the time period proscribed by the statute.

56. Defendant failed to reasonably search for responsive records.

57. The fees charged by the Defendant to perform the search were not reasonable.

58. The Defendant has failed to properly apply the statutory exemptions for withholding documents.

59. Plaintiff is entitled to injunctive relief including a declaration affirming the FTC may not charge Plaintiff additional FOIA fees associated with further production under FOIA 2017-00444.

SECOND CAUSE OF ACTION: BREACH OF CONTRACT

60. Plaintiff re-alleges the allegations contained in ¶¶ 1- 52.

61. The Court has jurisdiction over this cause of action pursuant to 28 U.S.C. 1346 (a)(2).

62. Plaintiff and the FTC had an express or implied contract for the production of documents responsive to FOIA Request 2017-00444.

63. The FTC required that CH deposit with the agency escrow funds before it would search for records in response for FOIA Request 2017-00444.

64. As directed, CH tendered an initial deposit of \$2,500.00 of escrow funds as an estimated payment for costs of FOIA Request 2017-00444.

65. The Defendant made an additional demand for payment in the amount of \$500.00 after the statutory period to respond to FOIA Request 2017-00444 had expired.

66. CH made its \$2,500.00 and \$500.00 payments with reservation of its legal rights to recover the funds because: (i) the FTC failed to properly account for previously escrowed funds; (ii) the FTC was not statutorily entitled to charge such fees; and (iii) the Defendant would have terminated the FOIA Request 2017-00444 if the Plaintiff did not make the payments.

64. As a direct result of the FTC's actions, Plaintiff has suffered damages of approximately Three Thousand Dollars (\$3000.00 US) plus the judicial rate of interest.

WHEREFORE, Plaintiff respectfully prays that this Court:

a. enter an order finding the FTC's actions in response to FOIA Request 2017-00444 are in violation of the Freedom of Information Act;

b. enter an order enjoining the FTC from further violating the Freedom of Information

Act;

c. enter an order requiring the Defendant to disclose, in their entirety, the records responsive to FOIA Request 2017-00444 by making copies of those records available to the Plaintiff forthwith;

d. enter an order directing the FTC not to charge additional fees to produce documents in response to FOIA Request 2017-00444;

e. enter an order directing that in all future cases in which the FTC will charges fees for FOIA production that the FTC is to provide auditable invoices showing who provided services, what services were provided and the specific dates and time lengths when services were rendered;

f. enter judgment against the FTC for compensatory damages, in the amount of Three Thousand Dollars (\$3,000.00 US) plus interest;

g. award Plaintiff its costs and reasonable attorneys' fees incurred in this action; and

h. grant such other relief as the Court may deem just and proper.

Dated: February 13, 2018

Respectfully submitted,
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